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BALTHAZAR & SONS, LTD. v. COMMISSIONERS FOR THE PORT OF RANGOON.

CARR, J.

terms in the Bengal Local Self-Government Act also include omissions.

No authority to the contrary has been cited. The interpretation adopted in these cases is in my opinion the only one reasonably possible and in my opinion the suit against the respondent was rightly dismissed.

This application is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Maung Ba.

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Feb. 28.

K. S. E. MOHAMED CASSIM AND OTHERS *v.* JAMILA BEE BEE.

Limitation Act (IX of 1908), Sch. I, Art. 182, cl. 5 and Explanation 1—Decree against judgment-debtor alone is not decree passed against him and his surety jointly—Applications for execution against judgment-debtor alone does not save limitation against surety.

Held that where a surety has signed a bond for the due satisfaction, in *whole* or in part, of a decree passed or to be passed against a person, the decree cannot be said to be passed jointly against the judgment-debtor and his surety, so that applications for execution under cl. 5 of Art. 182 of the Limitation Act against the judgment-debtor alone, which would save limitation against the judgment-debtor, would not avail as against the surety if execution is sought against him for the first time after three years from the date of the decree.

Narayan, v. *Timmaya*, 31 Bom. 50—*followed.*

Leach for the appellants.

Chari for the respondent.

The 1st appellant and one Gani whose respresentatives are the rest of the appellants signed a bond in an administration suit for the sum of Rs. 15,000

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* Civil First Appeal No. 231 of 1927 against the order of the District Court of Hanthawaddy in Civil Execution No. 66 of 1926.

to be paid by them whenever ordered by the Court and upon default by the defendant in paying into Court such sum of money as he may be required to pay in the suit by the Court. On the signing of this bond, the Bailiff's appointment as receiver was cancelled, and the property restored to the defendant who gave certain undertakings in respect thereof. Plaintiff obtained her decree against the defendant for over Rs. 60,000 in August 1923. In February 1926 she applied for a transfer of the decree for execution against the defendants at Ramnad and also applied for execution against him in Burma. She could not execute the decree, and in November 1926 she applied for a notice calling upon the defendant to pay the decretal amount in Court. This application was also infructuous. Plaintiff then applied in December 1926 for notice against the sureties calling upon them to pay the sum of Rs. 15,000 in Court. They resisted the claim on the ground of limitation and also on the ground that the defendant was removed from the position of receiver without notice to them. The District Court held that limitation was saved by the previous applications of the plaintiff, and that defendant was never a receiver, nor were the sureties his sureties as receiver. On appeal the High Court upheld the latter ground, but reversed the order of the District Court on the point of limitation. The portion of the judgment dealing with it being as follows :—

HEALD and MAUNG BA, JJ.—But the question remains whether or not execution as against the sureties was barred by limitation, and that question resolves itself into the question whether or not the applications of the 9th of February 1926, which would certainly save limitation, so far as execution against

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K. E. Mahomed was concerned, would also save limitation as against the sureties.

Clause 5 of Article 182 of the First Schedule to the Limitation Act says in effect that an application for execution of a decree can be made within three years from the date of the last application in execution, provided of course that that last application was itself within time, and there is a provision to that Clause which says that where the decree has been made jointly against more persons than one, the application, if made against any one or more of them shall take effect against them all. The lower Court's view seems to have been that the decree in this case against K. E. Mahomed must be regarded as a decree passed against K. E. Mahomed and his two sureties jointly because it can be executed against the sureties as well as against K. E. Mahomed, and that therefore an application for execution against K. E. Mahomed, the principal debtor, saved limitation as against the sureties.

This matter was discussed in the case of *Narayan Ganpatbhai Agsal* v. *Timmaya bin Subbaya and another* (1), which was a case where during the pendency of a suit a debt due to the defendant was attached before judgment and the attachment was removed on security for the due performance of the decree being given. More than three years from the date of the decree the plaintiff sought to execute the decree against the surety. He claimed that limitation was saved by a previous application for execution against the defendant. The Court held that the decree could not be regarded as having been passed jointly against the judgment-debtor and the surety, and that therefore an application of execution against the defendant did not save limitation as

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against the surety. So far as we are aware that decision has never been overruled and we accept it as good law.

We hold therefore that the applications of the 9th of February 1926 do not save limitation in respect of execution against appellants, and accordingly we allow the appeal and, setting aside the order of the lower Court, we dismiss the application for execution as against appellants as being time-barred.

Respondent will pay appellants' costs in both Courts, advocate's fee in each Court to be five gold mohurs.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Maung Ba.

1928

Feb. 28.

MAUNG TUN SEIN
v.
KO TU AND FIVE OTHERS.*

Partition, fact of, can be proved by oral evidence—Inadmissible document containing terms of partition— Evidence Act (I of 1872), s. 91.

Held, that the fact of partition may be proved by oral evidence, notwithstanding that the terms of partition are embodied in a document which cannot be proved. S. 91 of the Evidence Act is concerned with the terms of a document, not with the fact of the transaction.

Chhotalal v. *Bai Mahakore*, 41 Bom. 466—*referred to.*

Thein Maung for the appellant.

Tha Kin for the respondents.

HEALD and MAUNG BA, JJ.—This appeal arises out of an administration suit relating to the estate of U Po and Ma Shwe Me, a Karen Buddhist couple.

* Civil Second Appeal No. 307 of 1927 against the judgment of the District Court of Myaungmya in Civil Appeal No. 20 of 1927.